Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	MB Docket No. 04-232
Retention by Broadcasters of	)	
Program Recordings	)	

To: The Commission

COMMENTS OF WESTERN STATES PUBLIC RADIO, SOUTHERN PUBLIC RADIO, AND CALIFORNIA PUBLIC RADIO ON BEHALF OF THEIR MEMBER PUBLIC RADIO STATIONS

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Summary

The Commission proposes to require all television and radio broadcast stations to record and retain programming for the stated reason of enhancing the Commission's enforcement efforts against obscene, indecent, and profane programming. Western States Public Radio ("WSRP"), Southern Public Radio ("SRP"), and California Public Radio ("CPR") (collectively, the "Public Radio Regional Organizations" or "PRROs"), non-profit organizations whose membership is composed of noncommercial public radio stations in the western and southern states, believe that the proposed rules are overly broad. The record retention proposal will impose substantial costs on all broadcast licensees, even though only a relatively few stations have been implicated in indecency and profanity violations. Given that, by the Commission's own admission, relatively few complaints are ever dismissed for lack of a tape, transcript, or substantial excerpt of the programming in question, the Commission has failed to put forward a sufficient justification for so far-reaching and burdensome a rule.

The stations that are members of the PRROs are licensed to colleges and universities, both public and private, public school districts, and non-profit community broadcast stations, all of which typically suffer from chronic budget constraints. The estimated costs of compliance for such stations and their licensees, both initial and ongoing, will create additional burdens on small organizations and governmental entities that could far better use such funds to advance their educational, informational, and cultural missions. This is particularly true for licensees that, often as a matter of state policy, utilize translator and satellite stations to transmit their programs throughout a state or region, and for licensees who operate more than one stream of programming to multiple stations in the network. For such stations, the cost of compliance will be multiplied many times.

Finally, the member stations of the PRROs are justifiably concerned that, if they are required to tape all or nearly all their programming, it may have a chilling effect upon their governing bodies, producers, reporters, and other staff members, who may engage in unnecessary self-censorship. Since the record-retention program is clearly and admittedly directed at programming content, it directly implicates First Amendment principles of free speech and free expression. The federal courts have repeatedly found such restraints invalid, including a similar record retention program that was directed against public broadcasters.

The PRROs have also filed comments specifically directed to the Regulatory Flexibility Act ("RFA") and the Paperwork Reduction Act, in which they point out the particularly heavy burden the proposed regulation will impose upon small radio and television stations and the small entities to which these stations are licensed.

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Comments of Western States Public Radio, Southern Public Radio, and California Public Radio On Behalf of Their Member Public Radio Stations

Western States Public Radio, Southern Public Radio, and California Public Radio, on behalf of approximately 200 public radio stations operated by the members of these three organizations (collectively, "Public Radio Regional Organizations" or "PRROs") jointly submit these comments pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. § 1.415, with respect to proposed rules in the above-captioned proceeding.[1] The proposed rules, according to the *NPRM,* would require broadcasters to retain recordings of programs as a means of "enhancing" Commission enforcement of the statutory prohibition on indecent and obscene programming.

The Public Radio Regional Organizations are strongly opposed to this – or, indeed, any – record retention requirement on practical, legal, and Constitutional grounds. Accordingly, the PRRO urge the Commission to dismiss the proposed rulemaking and reject implementation of any record retention requirement for broadcast stations.

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[1] *Retention by Broadcasters of Program Recordings, Notice of Proposed Rulemaking,* MM Docket No. 04-232, released July 7, 2004.

Introduction

Western States Public Radio ("WSPR"), Southern Public Radio ("SPR"), and California Public Radio ("CPR") are non-profit membership organizations whose membership is made up of noncommercial public radio stations located in the Western and Southern regions of the United States. WSPR's membership includes stations located in the States of Alaska, Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Oklahoma, Oregon, Washington, Wyoming, and Utah. SPR's membership consists of stations located in the States of Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, and Texas. CPR's membership includes stations throughout the State of California. The member stations of these organizations are licensed to various non-profit and governmental entities, including public and private colleges and universities, public school districts, and non-profit community broadcast entities. Many, if not most, of these stations would qualify as "small radio stations" under the Small Business Administration definition (that is, having less than $5 million in annual receipts and not dominant in their respective markets). If the proposed record retention proposal were to be adopted, its financial, technical, and administrative consequences would fall particularly hard on stations represented by these Public Radio Regional Organizations.

I. The Proposed Rulemaking

The PRRO begin their comments with a discussion of the rulemaking proposal itself as set forth in the *NPRM*, in part because of what is, curiously, ***not*** found in that document. In the *NPRM,* the Commission proposes mandating a universal requirement that all broadcasters -- regardless of size, revenues, or prior history -- retain recordings of 16 hours of their daily programming for a period of 60 to 90 days. The *NPRM* indicates that the Commission's reason

for imposing this requirement on broadcasters is to "increase the effectiveness of the Commission's process for enforcing restrictions on obscene, indecent, and profane broadcast programming." *NPRM*, at 1. The *NPRM* elsewhere states that the Commission is seeking comment on this proposal because it believes mandatory recording retention will "improve the adjudication of [indecency] complaints," (*NPRM* at 2). The *NPRM* then describes the Commission's current procedures that govern the filing and consideration of such complaints.

Under the present procedures, as explained by the *NPRM*, enforcement actions are initially triggered by "documented complaints received from the public." Complainants are generally required to provide a full or partial tape of the program in question, or a significant excerpt from it, along with the date and time of the broadcast and the station's call sign. The complaint must provide "sufficient information regarding the content at issue to place it in context," but the amount of information required from the complainant "need not be extensive" (*NPRM* at 2 -3). If the FCC staff determines that the complaint should be investigated, it issues a Letter of Inquiry (LOI") which requires the licensee to produce a recording or transcript of the program, if it has one.

What is missing from the *NPRM* is any discussion whatsoever of problems with the present enforcement system that need to be corrected by this specific proposal. We are provided no clue as to why the Commission really needs to have every single broadcast station record at least 16 hours of its programs each day and keep those records for a period of 60 to 90 days. The *NPRM* provides no information that would indicate that the staff is finding it difficult to enforce the indecency and profanity standards because of any lack of evidence. We are only informed, indirectly and in a footnote, that approximately one percent of complaints are ultimately

dismissed because neither the complainant nor the station can provide a tape, transcript, or significant excerpt of the program, but surely a one-percent enforcement gap could be deemed within acceptable limits when the alternative proposal is so burdensome on both a practical and a Constitutional basis.

Another topic missing from the *NPRM* is any discussion of why the Commission believes it is appropriate as a matter of administrative law to permit complainants who allege this particular type of violation to do so without any evidence whatsoever in support of the complaint. The *NPRM* gives no consideration to the potential mischief that could result if unsupported complaints were routinely permitted. Will the staff lose discretion and judgment over when to issue a Letter of Inquiry? If no evidence is required from the complainant, will this not result in automatic issuance of LOI's in response to every complaint? What effect could that have, on the Commission staff and on licensees, should a baseless campaign of harassment target a particular station? Such discussion is entirely missing from the *NPRM* itself, although Commissioner Copps seems to believe, without any explanation of his reasons, that complainants should have no evidentiary responsibility whatsoever.

Also missing is any consideration of less drastic alternatives. The Commission's proposed rule would end a licensee's discretion to retain or not retain program recordings by making such retention mandatory for all stations. Even though, under present Commission precedent, the Commission may make a presumptive determination that an alleged indecent program was in fact broadcast if the licensee is unable to provide a tape to refute the complainant's allegations [*NPRM* at 3, n.9, citing *Clear Channel Broadcasting Licensees, Inc.*, 19 FCC Rcd 1768 (2004)], this rule would not permit a station to exercise its own business

judgment regarding whether the expense of record retention is cost-justified. Instead, it would require mandatory retention of at least 16 hours per day of programming for a period of from 60 to 90 days by all broadcasters, regardless of size, commercial or non-commercial status, type of programming, or history of prior complaints of this nature.[2] The Commission's stated purpose for imposing this broad and extensive requirement is to "ensure that the Commission has a complete record before it in deciding whether to initiate enforcement proceedings after an investigation" (*NPRM* at 3). But the Commission fails to tell us whether enforcement has, in fact, been hampered to any significant extent, and how this proposal will alleviate any specific problems that it may have identified.

The *NPRM* states that the Commission seeks comments on the following subjects: the proposal itself, the appropriate length of time that programming should be retained, and -- rather ominously -- whether record retention requirements should be extended "so that they can be useful to enforcement of other types of complaints based on program content."[3] Comments are also sought, without any elaboration on why the Commission considers this drastic change necessary or beneficial, on whether complainants should no longer be required to provide a tape, transcript, or significant excerpt when they file an indecency or profanity complaint against a

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[2]Interestingly, the *NPRM* also fails to address whether low power FM stations and ITFS stations would also be subject to the proposed retention rules. On the one hand, it is difficult to discern any principled basis for exempting such stations while continuing to impose onerous record retention burdens on public radio and TV stations. On the other hand, it is difficult to imagine – particularly with respect to low power FM – how such stations could possibly find the resources to comply.

[3] Two examples, "children's television commercial limits" and "sponsorship identification requirements," are provided, without any indication that the Commission might consider any other types of program content "off-limits."

station. Overall, the *NPRM* reveals a regulatory proposal that has not been subjected to sufficient consideration by Commission staff and policy-makers, that has not been fully thought through or fleshed out, and that should be withdrawn without further action.

II The Program Recording and Retention Proposal Suffers from Fatal Defects as a Matter of Administrative and Constitutional Law and, for These Reasons, the Rulemaking Proposal Should Be Dismissed.

The Public Radio Regional Organizations have reviewed the NPRM, discussed it among themselves, and considered its probable effects on the operation, programming, and budget of their respective stations. Members of the Public Radio Regional Organizations are seriously concerned that these new requirements will have a significant financial, technical, and administrative impact on the resources of their respective stations. They are also greatly concerned that, for both their governing boards and employees, the mere knowledge that copies of the vast majority of station programming must be retained, not only for enforcement of indecency complaints but also to aid enforcement for various unspecified "other types" of complaints, will result in a chilling effect on programming decisions and choices. Due to these concerns, the Public Radio Regional Organizations have submitted these comments jointly on behalf of all their member stations in order to express their strong opposition to further development or promulgation of any record-retention requirement for the following reasons:

first, the Commission has failed to demonstrate any need for these regulations and, moreover, appears not to have fully considered its effects or performed any type of cost-benefit analysis with regard to this new and burdensome regulatory regime;

second, the requirement to record and retain the vast majority of programming will be a serious burden, administratively, technically, and financially, especially for NCE stations, which

are licensed to non-profit organizations and state and local government entities, many of which would qualify as "small radio stations under SBA standards;

third, as a matter of both administrative and Constitutional law, the proposed rule is overly broad and its burdens vastly disproportionate to the Commission's stated objective; and

fourth, as proposed, this requirement will have a chilling effect on the exercise of First Amendment rights of both broadcasters and listeners.

A. The Commission Has Not Established Any Need for This Rule.

The *NPRM a*ttempts to justify this proposed new mandatory record-keeping regime by claiming that it will improve the Commission's enforcement efforts. The *NPRM's* only actaul attempt at justification of the proposed rule is the following statement:

> because the specifics and context of the broadcast are critical to the determination of whether material is obscene, indecent, or profane, the more information the Commission can have in its possession about a program when it concludes an investigation. . . , the more informed a decision it can make" (*NPRM* at 3).

This reason, however much desired by Commission staff or indecency watchdog groups, merely states the Commission's ***objective*** in enacting the proposed rule. It does not establish any genuine ***need*** for a record-keeping requirement as extensive as the one proposed.. Nowhere in the *NPRM* – including the Initial Regulatory Flexibility Analysis ("IRFA") in Appendix A – has the Commission offered any indication that it has actually considered whether (or to what extent) a real need exists for mandatory record retention as the means to satisfy that objective.

In fact, the *NPRM* – including the IRFA – is devoid of any consideration of need with respect to the proposed rule, although determination of the need for a new regulatory regime is an essential part of the IRFA process under the Regulatory Flexibility Act of 1980, as amended,

5 U.S.C. §§ 601-612.[4] Rather, the *NPRM* itself provides significant evidence that the Commission, in fact, has no real need for the proposed rule. As the Commission admits in the *NPRM,* only a minuscule number of indecency complaints have been dismissed due to lack of a tape, transcript, or significant excerpts. In footnote 8 of the *NPRM*, the Commission notes that, out of 14,379 indecency complaints received during the period from 2000 through 2002, only 169 complaints had to be "denied or dismissed for lack of a tape, transcript, or significant excerpt." *NPRM* at 3, n. 8. This number represents only about one percent (1%) of all complaints.

Furthermore, as set forth in Exhibit 1 to Chairman Powell's March 2, 2004 response to Congressman John D. Dingell (which is cited in that same footnote), the vast majority of complaints in 2002, 2003, and 2004 were for a very limited number of programs.[5] Under present procedure and precedent, stations that choose not to keep tapes or transcripts of their programming do so at their own risk, because the Commission may exercise a presumption that an indecent broadcast in fact occurred when a licensee is unable to produce a tape or transcript to refute a listener's or viewer's complaint.[6] Where, therefore, is the problem?

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[4]The Public Radio Regional Organizations consider the implications of the RFA in more detail in Appendix A to these comments, which are also being submitted to the Office of Management and Budget ("OMB") and the Small Business Administration ("SBA").

[5]According to the Chairman's Exhibit 1, in the year 2002, 13,534 complaints out of a total of 13, 922 concerned the same four programs; in the year 2003, 239,837 complaints out of a total of 240,350 concerned only nine programs; and to date in 2004, 530,828 complaints out of 530,885 concerned the Super Bowl XXXVIII halftime show, leaving only 57 complaints about other programs. A copy of Chairman Powell's response, with exhibits, has been attached to these comments as Attachment 1.

[6]*NPRM* at 3, n. 9, citing *Clear Channel Broadcasting Licensees, Inc.,* 19 FCC Rcd 1768 (2004).

The PRROs believe that the relatively minor risk of the presumption to its member stations does not justify the costs – financial, administrative, and technical – that a full-scale record-retention program would impose upon its members, or upon broadcasters in general. Given the financial and other practical constraints facing NCE stations today, the PRROs must take the position that the decision whether to protect themselves from such a presumption should be a voluntary one, particularly for public radio and other NCE stations. In this regard, the PRROs note that, according to the Exhibit 2 chart appended to the Chairman's letter to Congressman Dingell, out of 52 NALs and forfeitures issued over the past ten years, only two of the licensees appear to be NCE stations, one of which complaints was dismissed upon a finding that the program was not indecent.[7] Clearly, public radio stations are not the problem.

As the Commission concedes in footnote 9, "a broadcast station may currently retain recordings on a voluntary basis in the absence of a mandate from the Commission." *Id.* In that footnote, in fact, the Commission goes on to recognize that enlightened self-interest may achieve as much, if not more, than command-and-control rulemaking (some broadcasters "may find it in their interest to retain recordings for a longer period than the proposals above suggest"). *Id.* Such extensive recording may be a particularly good option for stations that can afford to do so or are more at risk for indecency complaints, but should any recording rule be mandatory for all? Why, then, in an era when voluntary, market-driven solutions are routinely found preferable to heavy-handed government regulation, does the Commission now propose to impose these

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[7]The PRROs have enclosed the full text and all attachments of the Chairman's letter to Congressman Dingell as Attachment 1 to these Comments.

burdensome and expensive taping requirements on all stations, particularly when no need has (or can be) shown? Pursuant to the Paperwork Reduction Act of 1995 ("PRA"), the PRROs intend to submit a copy of these comments to the Office of Management and Budget ("OMB").

In particular, the PRROs believe it is necessary for the Commission to consider thoroughly and to address in detail all question that arise under that law's analysis, such as whether this proposed information-collection requirement "is necessary for the proper performance of the functions of the Commission," as well as the issue of alternative ways to minimize the burden on stations that would be subject to the rule. *Id.,* at 6. Such considerations are particularly important with respect to NCE stations and those that would qualify as "small businesses," "small organizations," or "small governmental entities" under section 601 of the Regulatory Flexibility Act, 5 U.S.C. §§ 601 - 612.

Interestingly, the only place in the *NPRM* where the Commission even purports to address the "need for" the proposed record retention rule is in paragraph 2 of the IFRA (*NPRM,* Appendix A, p. 8). The Commission's statement in that paragraph, however, does not in any manner address the question of need. Rather, it simply indicates the Commission's ***objective***, which is "to enhance the indecency enforcement process" by requiring record retention. This description does not demonstrate any need for this rule whatsoever, but only its objective or preference.

Much more is required under the RFA, the PRA, basic administrative law principles, and the U.S. Constitution to establish that this particular burdensome requirement is, in fact, needed in relation to an important government function. The Commission has failed to justify its proposal by any showing of need. In fact, the Commission's own statistical data show that little

if any need exists to justify such a disproportionate burden, while both court and Commission precedent confirm that the Commission has previously reached (or been forced to concede) this same conclusion.

B. History of Record Retention Rules and Proposals (or "Deja Vu All Over Again"). Although the *NPRM* is curiously silent in this regard, this is not the first time the Commission has waded into the Constitutionally-murky waters of record retention mandates. In 1975, the Commission developed rules to implement a federal statute which sought to require all noncommercial educational radio and television stations which received any federal funding under the Communications Act to make audio recordings of all broadcasts "in which any issue of public importance is discussed," and to retain those recordings for 60 days.[8] The United States Court of Appeals for the D.C. Circuit struck down both the statute and the rules on First Amendment grounds in *Community-Service Broadcasting of Mid-America, Inc., et al., v. FCC*, 593 F.2d 1102 (D.C. Cir. 1978) (hereafter, "*Community-Service Broadcasting*").

In that case, as here, the Commission was unable to identify a compelling government interest in the requirements it sought to impose.[9] Rather, the Commission admitted to the Court that "it is difficult to identify a compelling governmental interest in the requirements of Section 399(b)." *Id.* In an echo of what it has stated in the present *NPRM,* the Commission sought to justify the record-retention requirements as a way to "facilitate the public's access to programming previously broadcast."

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[8] 47 U.S.C. §399(b) (Supp.V 1975), and the rules promulgated thereunder by the FCC, Report and Order, Docket 19861, 57 FCC2d 19 (Dec. 19, 1975).

[9] *Community-Service Broadcasting*, 593 F. 2d at 1111.

Other commenting parties, notably National Public Radio, have also commented upon the significance of the *Community-Service Broadcasting* decision as precedent with respect to the constitutional infirmities of the proposed rule. The PRROs, however, intend to explore this decision in some depth, not only because of its precedential value, but also because of the many elements in common between the present proposed rule, the rule invalidated by the *Community-Service Broadcasters* court, and the proposed record-retention rule under consideration by the Commission while the latter case was pending before the D.C. Circuit. The First Amendment implications of the present proposal will be considered in light of these two prior Commission attempts to require record retention by broadcasters, in Section E below.

The PRROs find it particularly interesting that the *NPRM* neglects to even mention this case or the Commission's other prior rulemaking attempt to require record-retention by all broadcasters. The Commission has failed to acknowledge its own sound policy decision, reached in that rulemaking proceeding while the *Community-Service Broadcasting* case was pending, to reject a staff proposal to require all broadcast stations, noncommercial and commercial, "to make and retain for disclosure transcripts, tapes or other recordings of all news and public affairs programming." *Petition for Rulemaking to Require Broadcast Licensees to Maintain Certain Program Records,* Third Report and Order, Docket No. 19667, 64 FCC 2d 1100, 1102 (May 24, 1977) (hereafter, "*Certain Program Records*" Rulemaking Order).

In that proceeding, the Commission heeded the comments of the majority of commenting parties, who pointed out the significant costs and other burdens on NCE and commercial

broadcasters in order to comply with the proposed rule.[10] The Commission quoted approvingly, in its Third Report and Order in that proceeding, industry comments which suggested that "video tape cost for [a] television station's news and public affairs programs over a two-year period would exceed $120,000" and "could reach more than $382,000." The reported cost simply for audio tape at a radio station was estimated to be at least $4,000 per station, "not counting personnel costs for production, cataloging, filing, storage, and retrieval of tapes." The Commission also took into consideration such expenses as "acquisition of additional . . . equipment; institution of a tape library; and construction of additional storage space . . ." Another commenting party suggested an annual cost of $5,000, which the Commission did not doubt or dispute. *Certain Programs Records*, Third Report and Order, at 1112. These dollar figures, of course, reflect dollar values in 1977 and would be proportionately higher today.

Commenting parties in that proceeding also raised concerns about the constitutionality of the proposal, warning that requiring stations to make, retain, and disclose such records would have a "chilling effect on free expression." *Id.,* at 1112-1113.

The Commission ultimately determined that "the record provides a sufficient basis for resolving the issue of whether a tape retention and disclosure requirement should be adopted" and announced its decision not to implement the proposal. The Commission acknowledged that "the concern that the proposed rule might have a chilling effect on free speech cannot easily be

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[10] See *Certain Programs Records*, 64 FCC 2d at 1110 - 1114, including all footnotes, particularly n. 12 (quoting estimates by commenting parties of annual costs of compliance in the range of hundreds of thousands of dollars). National Public Radio, in its Comments in the present proceeding, has provided estimates of some of the costs with which its members may be faced in order to comply with the present proposal.

dismissed," but avoided basing its determination on the constitutional issue as unnecessary to its ruling, stating that "[w]e simply are not convinced that the public benefits outweigh the costs imposed." *Id.* The Commission went on to explain that

> [t]he level of interest of the public in such recordings and the level of government need for them do not appear to justify the costs imposed on broadcasters. Opinions may vary as to the amount of those costs, but there is no doubt that production, retention, retrieval and playback of the recordings would cause almost every station to expend money which is now available for public service programming or other purposes."

The Commission expressed particular concern that "the burden would fall in a disproportionately heavy manner on very small stations . . " *Id.*

Although the Commission has conveniently forgotten to mention either this rejected rulemaking or the D.C. Circuit decision in *Community-Service Broadcasting*, the same principles, constitutional and administrative, apply today -- nearly 30 years later – in the above-captioned proceeding. The technology related to compliance may be different in nature for some stations in 2004, but the financial, technical, and administrative burdens are as great today as they were in the late 1970s. In some cases, the burden of the newly-proposed rule will be even greater than previously estimated, since these previous rules only required the taping and retention of news and public affairs programming, whereas the proposed rules in this proceeding require copying and retention of 16 hours of programming per day.

The Commission cannot, however, simply ignore these precedents, as it has attempted to do in this *NPRM*. Rather, the Commission must take the *Community-Service Broadcasting* case and the *Certain Programs Records* rulemaking decision into consideration, and must explain why it believes these precedents do not control the present proposal as a matter of law and of policy. An administrative agency cannot simply ignore its own precedents and previous policy

decisions, but must instead make the effort to explain how the present case may be distinguished from prior actions. *See, e.g., Federal Election Commission v. Cong. Charles G. Rose,* 806 F. 2d 1081, 1089 (D.C. Cir. 1986) ("an agency's unjustifiably disparate treatment of two similarly-situated parties works a violation of the arbitrary-and-capricious standard."). In a case involving the Federal Aviation Administration, the U.S. Court of Appeals for the D.C. Circuit faulted the FAA for having "utterly failed to provide a consistent approach that would allow even a guess as to what the decisional criteria are or should be," and admonished the agency that, on remand, it would be required to "act on the petitions in a consistent manner" with all deviations from prior rulings "carefully reasoned and fully explained." *Airmark Corp. v. FAA,* 758 F/ 2d 685, 691 - 95 (D.C. Cir. 1985). In this *NPRM*, the Commission has not even acknowledged its own prior determination, much less provided a rationale or explanation for its current 180-degree deviation from the prior decision.

C. The Proposed Rules Are Unduly Burdensome, Particularly on NCE and Public Radio Stations. In section I. A. of its Comments, National Public Radio discusses the likely costs for public radio stations to implement a record retention requirement, as well as the burdensome nature of such costs, particularly for smaller stations. Rather than repeat the same details here, the Public Radio Regional Organizations adopt that section of the NPR Comments and incorporate it by reference here.

The Public Radio Regional Organizations understand the particular problems that they would incur if their member stations are required to comply with the proposed record retention requirements. Many of these stations fit the examples, provided in NPR's Comments, of stations whose "costs could multiply" for one of several reasons. For one thing, stations in many western

and southern states have been networked in order to provide service to rural and otherwise underserved areas. Some licensees, as NPR suggests, operate multiple stations or multiple station networks, which permits them to offer more than one stream of programming. Which of its satellite or translator stations should such licensees record or retain? Or, since one cannot predict which station a particular complainant might be listening to, must they do so separately for all stations and program streams within their network?

The burdens on PRRO stations are not only financial. In addition to technical, administrative, and staff burdens, stations may find themselves grappling with a host of unintended consequences. For example, many of the stations within the PRROs are licensed to government entities and, accordingly, may be subject to state public record laws. If such stations are required to comply with a mandatory record retention regime, it is highly likely that copies of these records could be sought under these state laws, creating unique administrative and financial problems. The FCC record retention program will create new categories of records that members of the public might request (including those who missed a favorite program or may want their own copy of it). The need to allocate staff, or hire more staff, for various tasks related directly and indirectly to compliance with the proposed rule is yet another aspect of the administrative, technical, and financial nightmares that may result if wholesale public access to such records inadvertently becomes an inexpensive way for the public to help itself to copies of their favorite public radio programs.

In addition to becoming involuntary program archivists, stations may also be at risk with respect to prosecutors who will now have access to several months of news reports should they wish to subpoena these records. More specific examples of the costs and burdens, should the

Commission need them, may be provided in the Reply Comments to be filed by the PRROs. In the interim, however, the Commission should review the comments that were filed in the *Certain Program Records* rulemaking proceeding in 1977, translating the projected expenditures set forth in those comments, which it found credible and significant at that time, into 2004 dollars.

D. The Proposed Rules Are Overly Broad

As the PRROs have pointed out above, the Commission has been unable to demonstrate any level of need for these far-reaching and burdensome regulations. Looking at this issue first as a matter of administrative law, the overbreadth of the proposed requirements is obvious. The Commission's stated objective is "improved enforcement of the indecency rules." The *NPRM*, however, fails to provide evidence of any significant enforcement problem that requires improvement – in particular, improvement achieved by means of such a wide-ranging and burdensome a regulatory regime.

As the Commission's own data reveal, most of the indecency complaints it has received in recent years (however numerous those complaints in the past two years) involve relatively few programs and a relatively small number of licensees. Furthermore, extremely few complaints (only about 1% in the last few years) have been denied or dismissed for lack of a tape, transcript, or significant excerpt.

The case of public radio is instructive to demonstrate the overbreadth of the proposed rule. As set forth in Attachment 1 of these Comments (Chairman Powell's March 2, 2004 response to Congressman Dingell, Exhibit 2), the Commission issued NALs and Forfeitures in only 52 cases during the ten-year period from February 1,1994 through January 27, 2004. Of these 52 cases, only two involved NCE stations, one of which was resolved in favor of the

licensee. The only two NCE radio stations listed on the Indecency NAL/Forfeiture chart are *Agape Broadcasting Foundation, Inc.,* 13 FCC Rcd 9262 (February 10, 1998) (complaint originally filed July 12, 1992), and *The KBOO Foundation,* 16 FCC Rcd 10731 (EB 2001). In the former case, the forfeiture was reduced to $2,000; in the latter, the Commission ultimately determined that no sanction was warranted and rescinded the NAL on the basis that, measured by contemporary community standards, the song lyrics at issue were not indecent.

It is patently unfair, and more than a bit ironic, that small entities and nonprofit licensees such as the members of the PRROs would be forced to shoulder the financial and administrative burden of this record retention system which the Commission would employ almost exclusively for enforcement actions against the indecency excesses committed in the pursuit of ratings by wealthy stations and licensees (such as Clear Channel, NBC, Infinity, or Citicasters) that can afford to treat forfeitures, as well as record retention expenses, as merely a minor cost of doing business. The burdens of the record retention proposal will fall disproportionately on stations that can least afford it and have not provoked it.

Where, one might ask, is the problem that requires such an extreme solution? In order to remedy an alleged "enforcement gap" which, it admits, affects only about one percent of all indecency complaints, the Commission proposes an extensive – and expensive – mandate upon an entire industry. In order to police a relatively few egregious violations of the indecency law and rules, the Commission wants to impose the identical onerous burden on stations that have never been cited for running afoul of indecency standards. Like some high school home room class, all are to be punished for the infractions of a rambunctious few.

Furthermore, in order to spare complainants from having to substantiate their complaints,

the Commission (contrary to basic principles of U.S. jurisprudence) has decided to place the burden of proving one's innocence upon potential respondents. One looks in vain for an adequate explanation on the record for why this is a meritorious regulatory goal, for why every broadcast station should be forced to develop a full-scale record-retention program when each and every station presently has the discretion to do so voluntarily or, if it so chooses, to face the risk of the presumption in favor of the complainant's version of events. The Commission, in this proposal, appears to be shifting the burden of substantiating a complaint totally away from the complainant or staff, leaving the entire burden of proving a negative on broadcast stations.

Regulations such as these, overly broad, going far beyond what is necessary for an administrative agency to fulfill its mission, are often found arbitrary and capricious by the federal appellate courts. *See, e.g., Motor Vehicle Mfrs. Association v. State Farm Mutual Auto Ins. Co.,* 463 U.S. 29 (1983); *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.,* 419 U.S. 281 (1974). The FCC has provided only a few, not very relevant, facts to support its proposal and has failed to establish a rational connection between those facts and its desire to require all broadcasters to record nearly everything they broadcast. Although a cliche, the metaphor for such overly broad rules is nevertheless apt - the proposed rules are indeed an example of "killing a fly with a sledgehammer."

The U.S. Court of Appeals for the D.C. Circuit has ruled that an agency's failure to articulate the basis for its actions moves the decision it reaches "from the tolerably terse to the intolerably mute " - that is, a rule lacking sufficient justification. *Greater Boston Television Corp. v. FCC,* 444 F. 2d 841, 852 (D.C. Cir. 1970). In that case, the Court explained that judicial review of agency decisions is powered by the "need for conjunction of articulated

standards and reflective findings, in furtherance of evenhanded application of law . *Id.* Courts must be able to "discern the path the agency took in coming to its decision." *FEC v. Rose,* 806 F.2d at 1088. Perhaps another cliche, frequently invoked in the face of regulatory excess and overly zealous enforcement actions, provides the most appropriate response to this proposed Commission action: "if it ain't broke, don't fix it." This, in fact, is the conclusion the Commission reached the last time it found itself tempted to force all broadcast licensees to embark on an expensive unnecessary record-retention program. The Commission should come to the same realization here. The reasoning that caused the Commission to reject its prior incursion into taping mandates is still valid. The technology may be different from that which was state-of-the-art in 1977, but the burden on licensees is similar, if not identical, to that which caused the Commission to reject its own proposal back then. As it did in the *Certain Program Records* rulemaking, the Commission should reject this proposal once again. It was a bad idea in 1977 and is still a bad idea today.

E. The Proposed Rules Will Have a Chilling Effect on the Exercise of First Amendment Rights of Free Speech. Claiming to be "mindful that we must be cautious in our enforcement of Section 1464 with respect to indecency and profanity because free speech rights are involved," the Commission has asked for comment on "whether the proposal raises First Amendment issues." *NPRM* at 4. The members of the PRROs wish to bring to the Commission's attention their great concerns about the chilling effect the proposed requirement

will have on the First Amendment free speech rights of their stations, their employees, and their listeners.

The first point that must be recognized in considering the constitutional implications of this proposal is the fact that the taping requirement will affect forms of speech and expression well beyond those few examples which might be deemed indecent or profane. In order to "enhance" enforcement with respect to the relatively minuscule amount of broadcast speech that is subject to Section 1464 and the Commission's indecency/profanity rules, this proposal requires the recording of all programming that was broadcast, at least 16 hours of every day of programming. If courts are called upon to weigh the constitutionality of this requirement, strict scrutiny standards will apply, because the restraint operates beyond the focus of that statute and rules. Constitutional review will not be limited by reason of the Commission's authority to regulate indecent and profane speech. See *FCC v. Pacifica Foundation,* 438 U.S. 726, 748 - 50 (1978); *Industry Guidance On the Commission's Case Law Interpreting 18 U.S.C. §1464 and Enforcement Policies Regarding Broadcast Indecency,* 16 FCC Rcd 7999 (April 6, 2001) (hereafter, "Industry Guidance").

The proposed rules will affect all broadcast speech and expression, not only that which may be obscene, indecent, or profane. Thus, whatever latitude the Commission might enjoy with respect to indecency enforcement actions will not insulate the Commission from the strictest constitutional scrutiny in this instance. The D.C. Circuit's decision in *Community-Service Broadcasting,* since it deals with another FCC-imposed mandatory record-retention requirement, is instructive with respect to the way courts are likely to analyze the present version. Several significant lessons can be gleaned from that case.

The first of these is that the government bears "the burden of justifying any practice which restricts free decision-making" by broadcasters over the content or selection of programs to be broadcast. *Community-Service Broadcasting* at 1110. The second is that the finding of constitutional invalidity in *Community-Service Broadcasting* is not dependent upon the unique facts in that case (that is, the fact that the taping requirement was specifically imposed upon news and public affairs programming). Although the court did consider at length the particular First Amendment implications of that aspect of the regulation, it also pointed out that it "need not, however, rest upon this basis alone in invalidating" the statute and regulations in question there. *Id.,* at 1114.

> Rather, the Court ruled that when a statute or regulation imposes even
>
> incidental restraints on First Amendment freedoms, it can be upheld only [1] if it is within the constitutional power of the Government; [2] if it furthers an important or substantial government interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.' *United States v. O'Brien,* 391 U.S. 367, 377 . . . (1968)."

The *Community-Service Broadcasting* court reasoned that, even if the statute and regulations that required NCE stations to tape news and public affairs programs were within the government's power and unrelated to suppression of free expression, the retention requirement would fail the test of constitutionality. This is because the FCC had failed to identify any important or substantial government interest that the statute and rules furthered; nor had it shown that any restriction on First Amendment freedoms, however incidental, was no greater than necessary to further that interest. Under these *O'Brien* criteria, the court held the NCE taping requirement unconstitutional because, "even apart from the actual burdens of

compliance,"[11] it clearly was likely to have a chilling effect on the exercise of First Amendment rights by licensees. *Id.,* at 1114. As the Court pointed out in *Community-Service Broadcasting*, the Commission had (only a short time before that decision) found merit in comments filed in the *Certain Program Records* rulemaking which urged that the proposed taping rule would have a chilling effect on commercial licensees. The Commission had, in fact, made a finding that "the concern that the proposed rule might have a chilling effect on free speech and press" one that "cannot easily be dismissed." *Community-Service Broadcasting* at 1115, n. 28, quoting from the *Certain Program Records* rulemaking, 64 FCC 2d at 1113.

The nature of the chilling effect, the court reasoned, lies in the fact that FCC regulation renders licensees

> "subject . . . to a variety of *sub silentio* pressures and 'raised eyebrow' regulation of program content. . . .The practice of forwarding viewer or listener complaints to the broadcaster with a request for a formal response to the FCC, the prominent speech or statement by a Commissioner or Executive official, the issuance of notices of inquiry, and the setting of a license for a hearing on "misrepresentation" all serve as means for communicating official pressures to the licensee."

Id., at1116; accord, *MD/DC/DE Broadcasters Association v. FCC,* 236 F. 3d 13, 19 (D.C. Cir. 2001); *see also Writers Guild of America v. FCC,* 609 F. 2d 355, 365 - 66 (D.C. Cir. 1979)

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[11] The court singled out a number of "actual burdens" of compliance, including the requirement that stations "purchase equipment and devote staff time sufficient to record all such programming." The court also noted the possibility of disruption in a station's operations, particularly where the station is small and its staff limited." *Id.,* at 1114, n. 26. The court noted, at this point in its opinion, the Commission's then-recent determination in the *Certain Program Records* rulemaking that the burdens of a taping program on commercial licensees "outweighed any benefits to be secured, [and] decided that commercial licensees should not be subjected to a recording requirement." The same burdens, of course, will have a negative impact on all broadcast licensees, commercial and noncommercial, if the presently-proposed regulation is promulgated.

(noting that "the line between permissible regulatory activity and impermissible 'raised eyebrow' harassment of vulnerable licensees is . . . exceedingly vague").

The court in *Community-Service Broadcasting* explicitly found that:

> "the operation of the taping requirement serves to facilitate the exercise of 'raised eyebrow' regulation. . . . In seeking to identify the chilling effect . . . , our ultimate concern is not so much with what the government will actually do, but with how reasonable broadcasters will perceive regulation, and with the likelihood that they will censor themselves to avoid official pressure and regulation. . . . For it is one thing for a broadcaster to decide independently to retain recordings of his programming; it is quite another for him to be told . . . he must retain recordings and make them available to the Commission or to any individual who requests them."

Id., at 1116 - 17.

The court went on to explain that

> "[c]hilling is, by its very nature, difficult to establish in concrete and quantitative terms; the absence of any direct actions against individuals assertedly subject to a chill can be viewed as much as proof of the success of the chill as of evidence of the absence of any need for concern. . . . [I]t is the task of the court to evaluate the likelihood of any chilling effect, and to determine whether the risk involved is justified in light of the purposes served by the statute [or rule]."

Id., at 1118.

The court ultimately held that, because the statute and regulations "imposed restraints on First Amendment rights beyond those which are essential to fulfillment of its stated goal, such unnecessary restriction on First Amendment rights is clearly inconsistent with the requirements of *O'Brien.*" *Id.*, at 1122. The court concluded: "however much the FCC seeks to minimize the restraint in this case, the First Amendment does not permit us to tolerate even minimal burdens on protected rights where no legitimate government interest is truly being served." *Id.*

In the present instance, the Commission has failed to identify any compelling or essential government interest that would be furthered by the proposed restraint. Although it has

identified its objectives, it has not even attempted to identify any particular need for the retention requirement, nor has it considered whether its proposal is the least restrictive means of achieving its goals. It is important to keep in mind that the record retention program contemplated here involves the recording and retention of vast amounts of programming, much of it highly duplicative, and that the overwhelming bulk of this recorded programming will not even arguably be at risk of involving obscenity, indecency, or profanity. These constitutional infirmities, as well as the over breadth of the proposed regulation itself, make it highly likely that the courts will be receptive to a constitutional challenge to the proposed rules.

Finally, the PRROs believe they must address their comments to the specter, raised by the Commission almost nonchalantly and in passing, that it might consider expanding the purposes of the proposed record retention program to permit its use in other content-based enforcement actions ("We also seek comment on whether the proposed record retention requirements should be crafted so that they can be useful to enforcement in other types of complaints based on program content" *NPRM* at 3). The Commission should be far more sensitive to Constitutional principles which recognize that regulation of "program content" is the area most likely to violate the free speech and free press rights of broadcasters, as the court makes abundantly clear in *Community-Service Broadcasting.* The vaguely ominous hint of "other types of complaints" does not even carry the weak constitutional excuse that obscene or indecent speech may be at issue.

The PRROs are greatly concerned that the Commission appears to be considering a general record-retention program in which stations will routinely be required to help prove cases against themselves by providing recordings of any program to which some member of the

public – or interest group with an axe to grind – may take exception. The chilling effect that would result from such a regime, the impetus it would provide for self-censorship, would surely be found to violate the First Amendment rights of broadcasters.

Thirty years ago, the Commission caught itself just in time and, consequently, turned back from a requirement of mandatory record retention for all stations. The Third Report and Order in the *Certain Program Records* proceeding shows a Commission that recognized the validity of concerns expressed by commenting parties in that proceeding regarding the possible infringement of these constitutional freedoms. As the Commission described these comments, "[g]reat attention was given to the other main issue, the chilling effect on free expression which they envision would result from the proposal." *Certain Program Records* at 1112-13. The Commission's reaction at the time was to recognize that "the concern that the proposed rule might have a chilling effect on free speech cannot easily be dismissed," although the proposed rule was ultimately rejected on non-constitutional grounds. *Id.* Referring to the *Community-Service Broadcasting* case, which was then pending before the U.S. Court of Appeal for the D.C. Circuit, the Commission noted that "[g]uidance on this point may be received in another proceeding."

The guidance forthcoming from the D.C. Circuit in that case was that a record retention program for broadcasters raised so great a risk of a chilling effect on rights of free speech and free expression that it required review under strict scrutiny standards. Statutes or regulations that restrict or suppress free expression, even if only by virtue of a "chilling effect," the court said, "must be found unconstitutional unless either the speech in question is not fully protected by the First Amendment or its suppression is essential to a compelling government interest." *Id.*,

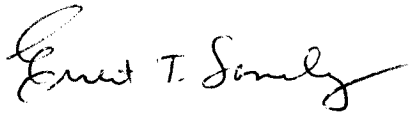
at 1111, citing, *inter alia, Gooding v. Wilson,* 405 U.S. 518 (1972); *Cohen v. California,* 403 U.S. 15 (1971); and *Brandenburg v. Ohio,* 395 U.S. 444 (1969).

In the *Community-Service Broadcasting* case, the FCC conceded that there was no compelling government interest that would be served by the record retention program proposed there. *Id.* Similarly, in the present situation, the Commission has failed to identify a need for the program, much less a "compelling" need. The PRROs urge the Commission to accept the Court's advice and follow its own prior example from the *Certain Program Records* rulemaking by dismissing this proposed rulemaking. Whether the proposed rule is rejected because of the risk that it will have a chilling effect upon broadcasters' exercise of free speech and free expression or because of the practical burdens it will impose, the proposed record retention program should be rejected summarily.

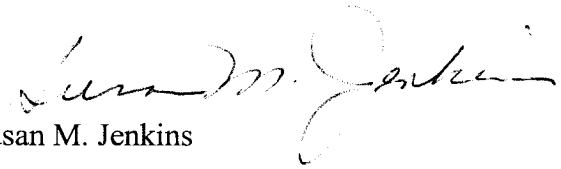
Conclusion

For the above reasons, the members of the Public Radio Regional Organizations urge the Commission to proceed no further with this rulemaking but, rather, to continue its present practice of permitting broadcast licensees to exercise discretion and their own business judgment regarding whether to make and retain copies of programs on a voluntary basis.

Respectfully submitted,



Ernest T. Sanchez



Susan M. Jenkins

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Dated: August 27, 2004

Appendix A

Comments of the Public Radio Regional Organizations on the FCC's Initial Regulatory Flexibility Analysis

Western States Public Radio ("WSPR"), Southern Public Radio ("SPR"), and California Public Radio ("CPR"), on behalf of their members (collectively, the "Public Radio Regional Organizations" or "PRROs") wish to bring their comments on this *Notice of Proposed Rulemaking ("NPRM")* on *Retention by Broadcasters of Program Recordings*, including their specific comments regarding the Commission's Initial Regulatory Flexibility Analysis ("IRFA") contained in this Appendix A of that *NPRM,*[12] to the attention of the Office of Advocacy of the Small Business Administration ("SBA"). They will, therefore, file a copy of these comments with the Chief Counsel of the SBA, as directed by the Commission in Appendix A to the *NPRM.*

In its *NPRM,* the Commission requests comment on the impact of its proposed record retention program on small business entities, as defined in the Regulatory Flexibility Act of 1980 ("RFA")[13] An IFRA, as required by the statute, is appended to the *NPRM* as Appendix A.

A majority of the members of the PRROs would qualify as small entities under this statute and under the definition of "small business concern" utilized in the Small Business Act. As explained in their Comments to the Commission, WSPR's membership consists of NCE radio stations located in the states of Alaska, Arizona, Colorado, Idaho, Montana, Nevada, New

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[12] *Retention by Broadcasters of Program Recordings, Notice of Proposed Rulemaking,* MM Docket No. 04-232, released July 7, 2004 ("*NPRM*").

[13] 5 U.S.C. §§ 601 - 612, as amended by the Small Business Regulatory Enforcement Fairmess Act of 1996 ("SBREFA"), Pub. L. No. 104-121, title II, 110 Stat. 857 (1996).

Mexico, Oklahoma, Oregon, Washington, Wyoming, and Utah, SPR's membership consists of NCE radio stations located in the states of Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, and Texas and, of course, CPR represents stations located in California. These stations are, variously, licensed to non-profit community organizations, educational institutions, and state or local governments.

As the FCC has previously recognized (*see* Sections II. B and E), the negative financial and administrative impact of such regulatory regimes on small entities can be devastating. In the earlier proceeding discussed in the sections cited above, the FCC took very seriously the comments of radio and TV licensees which estimated the direct and indirect costs of such a record retention regime in the range from thousand to hundreds of thousands of dollars. These figures, of course, were stated at the time in 1977 dollar values, but the PPROs and their members are concerned that small radio stations, including public stations, may incur costs of a similar nature and range if this requirement is imposed on small entities as well as larger stations and multi-licensee chains. The PPROs do not understand why the Commission, which dismissed its own proposal for this very reason in 1977, has not proposed an exemption for small entities, or at least for small noncommercial, non-profit, or government radio stations.

As set forth in Attachment 1 of these Comments (Chairman Powell's March 2, 2004 response to Congressman Dingell, Exhibit 2), the Commission issued NALs and Forfeitures in only 52 cases during the ten-year period from February 1,1994 through January 27, 2004. Of these 52 cases, only two involved NCE stations, one of which was resolved in favor of the

licensee.[14] It is patently unfair, and more than a bit ironic, that small entities and nonprofit licensees such as the PPROs' members would be forced to shoulder the financial and administrative burden of this record retention system which the Commission would employ almost exclusively for enforcement actions against the indecency excesses committed in the pursuit of ratings by stations and licensees (such as Clear Channel, NBC, Infinity, or Citicasters) that can afford to treat forfeitures, as well as record retention expenses, as merely a minor cost of doing business.

The burdens of the record retention proposal will fall disproportionately upon small entity licensees or government entities who are not only least able to afford it but are also demonstrably not part of the underlying enforcement problem that the proposed regulatory regime will supposedly address. The Commission clearly has not studied the impact of its proposal upon small business concerns and small entities. At the very least, it has totally failed to explain the discrepancy between the policy decision it made in the *Certain Program Records* rulemaking proceeding in 1977, when it rejected its own record retention proposal in recognition of the costs it would impose on small stations, and its present proposal for a far more extensive record retention program.

The PRROs note that, among the Congressional findings underlying the RFA, the following subsections are directly applicable to this particular rulemaking:

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[14]The only two NCE stations listed on the Indecency NALs/Forfeitures chart are *Agape Broadcasting Foundation, Inc.,* 13 FCC Rcd 9262 (February 10, 1998) (complaint originally filed July 12, 1992), and *The KBOO Foundation,* 16 FCC Rcd 10731 (EB 2001). In the former case, the forfeiture was reduced to $2,000; in the latter, the Commission ultimately determined that no sanction was warranted and rescinded the NAL, on the basis that, measured by contemporary community standards, the song lyrics at issue were not "patently offensive and therefore not indecent."

"(a) (2) laws and regulations designed for application to large scale entities have been applied uniformly to small businesses, small organizations, and small governmental jurisdictions even thought the problems that gave rise to government action may not have been caused by those smaller entities;

(3) uniform Federal regulatory and reporting requirements have in numerous instances imposed unnecessary and disproportionately burdensome demands including legal, accounting and consulting costs upon small businesses, small organizations, and small governmental jurisdictions with limited resources;

(4) the failure to recognize differences in the scale and resources of regulated entities has n numerous instances adversely affected competition in the marketplace, discouraged innovation, and restricted improvements in productivity;
. . .

(b) it is the purpose of this Act to establish as a principle of regulatory issuance that agencies shall endeavor . . . to fit regulatory and informational requirement to the scale of the businesses, organizations, and governmental jurisdictions subject to the regulation. To achieve this principle, agencies are required to solicit and consider flexible regulatory proposals and to explain the rational for their actions to assure that such proposals are given serious consideration."[15]

In line with this statement of Congressional intent, the PPROs wish to address the following specific issues raised by the Commission's IFRA (Appendix A to the *NPRM).* In the first place, neither the NPRM nor the IRFA adequately explains the FCC's rationale for this record retention proposal. Paragraph 2 of the IRFA, in which the Commission purports to discuss the "Need For, and Objectives of, the Proposed Rule," contains no explanation and no findings that would indicate any possible need for these particular requirements.

Rather, the section simply states the FCC's objective ("to enhance the indecency enforcement process") without in any manner whatsoever linking how these requirements are

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[15]RFA; findings and purposes, Act Sept. 19, 1980, P.L. 96-354, § 2; 94 State. 1164 (effective Jan. 1, 1981, as provided by § 4 of such Act, which appears as a note to this section)

necessary to the enforcement process. A reading of the entire *NPRM* leaves one with the distinct impression that the proposed record retention program is little more than a *preference* of some Commissioners, staff, and interest groups, but no showing of need is anywhere made. In fact, the FCC provides data, in footnotes 8 and 9 of the *NPRM*, which indicate that the lack of such a record retention regime may have been responsible for dismissals of complaints in no more than 1% of all enforcement actions. The FCC has failed to justify why it wishes to impose these regulatory burdens and the expense of compliance on ***any*** station under its jurisdiction, let alone small businesses, small organizations, and small government entities. No such data, no such analysis, has been provided.

Instead, the FCC has placed the burden on commenting parties to provide such data and analysis. In Paragraphs 4, 5 and 6 of the IFRA the FCC does no more than indicates the definitions of terms such as "small entity," and "small business,""small television station," and "small radio station," and then lists the total number of all TV and radio stations that will be subject to the proposed rule. It does not even estimate how many of these stations might fit within these "small station" or "small entity" definitions. While the FCC does ask for comment on "the possible cost burden these requirements would place on small entities," it has failed to do any of this research itself, even though Commission staff, who have been conducting hearings on localism throughout the country and have industry data readily available to them, should certainly be able to conduct their own study of the probable financial, technical, and administrative burdens of this proposed rule on small stations and small entity licensees.

Likewise, paragraph 7 of the IFRA fails to provide the required information. This paragraph does not contain a "description" of the requirements for compliance. Rather, all it

says is that "[t]he proposed rules would impose *additional* reporting or record keeping requirements," without describing or quantifying such requirements in any way, and concludes by asking for comment on the cost burden of these unspecified "requirements." How can affected parties provide a reasonable response to this invitation to comment when provided with so little information upon which comments could be based? The PPROs and their members find themselves unable to adequately respond to this and other issues in the IFRA because of the paucity of information provided by the FCC.

The same problem exists with respect to paragraph 8, in which the FCC is supposed to indicate what steps it has taken to minimize significant impact on small entities, or any significant alternatives it has considered. The FCC provides no such information. Rather, it again calls for industry comment and suggestions on these issues, without having done any of the preliminary groundwork itself. It appears that the FCC has given no more than lip service to the requirements of the RFA and the Small Business Act.

The PPROs urge the Office of Advocacy and its Chief Counsel to insist that the FCC fulfill all required elements of a Regulatory Flexibility Analysis. We also ask that you remind the FCC to be mindful of the Congressional findings and Congressional intent underlying the RFA. Small entities should not be saddled with mandates designed to do little more than make work a little easier for agency staff in enforcement actions which have primarily been directed against the big players in this industry.

Appendix B:

Comments of the Public Radio Regional Organizations on the FCC's Paperwork Reduction Act Analysis.

The FCC has solicited comments on several issues which arise under the federal Paperwork Reduction Act of 1995 ("PRA"), Public Law 104-13. Accordingly, the Public Radio Regional Organizations append to their comments on the *NPRM* these additional comments directed toward these PRA issues. Please see the discussion of the Public Radio Regional Organizations in the main text of these comments for a description of these groups and their members.

1. The Commission first asks whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility. The PPROs respond that the proposed information collection is clearly overkill, vastly disproportionate to any need that the Commission, its staff, or the public could have for the information in the context for which it is proposed. That is, the FCC has admitted that only about 1% of all its indecency enforcement actions in recent years have had to be dismissed due to lack of a tape, transcript or significant excerpt from the broadcast in question. Furthermore, as the FCC has conceded that, even in such cases, it can turn to the enforcement alternative of exercising a presumption that the broadcast occurred as stated by the complainant. The FCC has not demonstrated a very large number of enforcement actions in total (the large number of complaints in recent years are almost entirely related tothe same few programs), and can show few if any enforcement actions involving public broadcasting. Thus, the Commission has failed to demonstrate any real need for this proposed

rule and has, in fact, inadvertently provided support for the alternative of voluntary record retention, which would adequately cover the vast majority of indecency enforcement situations.

2. The Commission next seeks comment on the accuracy of its burden estimates. The problem here is that the Commission has not provided any estimate whatsoever of the burden this record retention program will impose on stations, including stations licensed to small entities. Until it actually provides such an estimate, it is impossible for any commenting party to determine whether any such estimate is accurate. Here, as with the other issues, the FCC is looking for commenting parties to provide such estimates in the first instance, rather than allowing them to submit comments on the Commission's estimates.

3. The Commission also seeks comments on "ways to enhance the quality, utility, and clarity of the information collected." Because the Commission has not yet justified the need for its program, explained its contours and parameters, or provided any estimate of the burden imposed on stations, the PPROs find themselves unable to provide any hypothetical "enhancements" to improve the program. The Commission should first be required to explain and justify the basic proposed rules before it seeks this type of response from the industry.

4. Finally, the Commission asks commenting parties to address "ways to minimize the burden of the collection . . . on respondents." The PPROs believe that the burden may best be minimized by making no change in the present system. At present, the Commission leaves it to the discretion of station licensees whether or not to make and retain records of programming, as well as the form in which such records might be kept. Those stations that, for whatever reason, choose not to make or retain such records run the risk of the operation of a presumption, in an indecency enforcement action, that the broadcast in fact occurred as the complainant claims.

Many licensees, including small entities, might well decide, in the exercise of sound business judgment, that the cost/benefit analysis with respect to stations under their management supports a decision not to tape. Many factors might go into the decision-making process of a business or non-profit organization in reaching that judgment, including such elements as the likelihood that on-air staff of the station will run afoul of the indecency rules and guidelines, the level of risk-tolerance of its management and governing body, the expense and other burdens of a record retention program, etc. Since, as the FCC tells us, only 1% of all complaints have been dismissed in recent years due to lack of a tape, transcript or significant excerpt, and since the presumption can be applied to further minimize any perceived enforcement gap, however slight, it seems far more reasonable for the Commission to rely on voluntary compliance instead of a heavy-handed across-the-board mandate upon all stations.

Copies of the entire set of comments of the PPROs, including this Appendix B, will be submitted to Leslie Smith, FCC Staff, and Kristy L. LaLonde, OMB Desk Officer, as commentary upon the Paperwork Reduction Act elements of this proposed rule. The PPROs believe that the totality of their comments provide a background and additional matter for consideration by OMB and the Commission's PRA compliance staff beyond what is contained in this Appendix B.

Attachment 1

**Chairman Powell's March 2, 2004 Letter to Congressman Dingell,
With Attached Exhibits 1 and 2**

Federal Communications Commission

Washington, D.C.

CHAIRMAN

March 2, 2004

VIA HAND -DELIVERY

The Honorable John D. Dingell
Ranking Member
Committee on Energy and Commerce
United States House of Representatives
Washington, D.C. 20510

Dear Congressman Dingell

This letter transmits my written responses to the post-hearing questions you posed in connection with my February 11, 2004 appearance before the Subcommittee on Telecommunications and the Internet regarding the "Broadcast Decency Enforcement Act of 2004."

I appreciate the opportunity to respond to the issues and concerns in which you are interested.

Sincerely,

Michael K. Powell
Chairman

attachment

ATTACHMENT

I. ***FCC Process for Reviewing and Disposing of Consumer Complaints***

1. How many complaints alleging that a broadcast contained indecent content has the Commission received during each year?

See Exhibit 1.

2. How many programs have been the subjects of such complaints during each year? Please list each program and, in each instance, please provide the station, licensee, and corporate parent.

See Exhibit 1. Information regarding specific programs prior to 2000 is not available. We can provide the requested information regarding specific programs for 2000-2004 by March 19, 2004.

3. How many complaints have been dismissed or denied each year?

See Exhibit 1.

4. How many complaints have remained pending at the end of each year?

See Exhibit 1

5. In its 2001 Policy Statement on Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. Sec. 1464 and Enforcement Policies Regarding Broadcast Indecency, the Commission states that in order for a complaint to be considered, "our practice is that it must generally include . . . a full or partial tape or transcript or significant excerpt . . ." If the complaint does not contain such information, the Commission states that the complaint "is usually dismissed." During each year, how many complaints has the Commission dismissed or denied for lack of a tape, transcript, or significant excerpt?

Year	Dismissed/Denied for Lack of Tape/Transcript/Excerpt */
2004	6
2003	18
2002	84
2001	62
2000	23
1994-1999	NA

*/ It should be noted that, as pointed out on the Commission's website, "[t]he Commission and/or Enforcement Bureau have proposed or assessed monetary forfeitures in cases where the complaint did not include a tape or transcript of the actual broadcast." **http://www.fcc.gov/eb/broadcast/obscind.html**. In this regard, in a footnote to the excerpt that you quote from the Commission's *Forfeiture Policy Statement*, the Commission refers to a forfeiture in which "[w]hile the complainant did not provide us with an exact transcript of the broadcast, we find that she has provided us with sufficient context to make the determination that the broadcast was indecent."

6. Is it the practice of the Commission to respond to each individual complainant once the Commission receives a complaint, informing the complainant that the complaint has been received?

In light of the Commission's staffing constraints and the volume of indecency complaints it receives, it is not the current practice of the Commission to notify each complainant to confirm that his or her filing has been received. However, our Consumer and Governmental Affairs Bureau is exploring technical options for automatic notification to complainants of complaints e-mailed to the Commission's official site and we hope that such a system may be in place within the next 12 months.

7. Is it the practice of the Commission to notify each individual complainant if his or her complaint is dismissed or denied? If not, how would a complainant know of his or her right to appeal the dismissal or denial by filing an application for review with the Commission?

In cases in which the Commission denies or dismisses an indecency complaint, the Commission generally does so by letter to the complainant. The only exception to this procedure is in cases in which the Commission has received a substantial number of

complaints about a particular program. In such cases, for purposes of expediency and administrative economy, the Commission has historically responded only to the lead complainant or organization. More recently, with the dramatic increase in multiple complaints about a particular program, we have begun a new practice of consolidating the complaints into one order denying or dismissing the complaints. Such an order is a public document, announced by public notice, and made available on the Commission's website.

8. Has the FCC ever been unable to receive incoming e-mail complaints? If so, please provide the Committee with a list of the dates on which the Commission was unable to receive such complaints.

During the past four months, the FCC has experienced numerous high volume email events that have placed extremely heavy loads on the agency's email infrastructure. Several of these events overloaded FCC systems to the point where email to and from the Internet was disrupted and incoming mail from the Internet was not deliverable. In those instances, corrective actions were taken and normal mail flow was restored in less than 24 hours. We do not have a record of the specific dates on which these difficulties occurred.

In response to these events, the Commission implemented several configuration changes to the email infrastructure to better accommodate these high volume email events. The Commission also accelerated the migration to a new, high performance firewall infrastructure capable of handling high volumes of incoming email. These firewalls were placed into service on February 25, 2004.

Finally, there was a situation in which email complaints that were being generated by an outside entity on behalf of various individuals failed to reach intended recipients at the FCC due to a technical issue with the sender's computer network, not that of the FCC. The FCC's computer technicians worked cooperatively with the sender's technical staff to resolve the issue and facilitated the subsequent delivery of the email complaints to intended recipients at the FCC. We do not have a record of the dates on which these problems were encountered and resolved.

II. FCC Process for Issuing and Acting on Notices of Apparent Liability

1. For each year in question, please provide the number of notices of apparent liability for forfeiture (NALs) issued to enforce the Commission's policies with respect to broadcast indecency.

Year	No. of NALs
2004	2
2003	3*/
2002	7
2001	7
2000	7
1999	2
1998	7
1997	7
1996	3
1995	1
1994	6

*/ We note that, at the end of 2003, we had pending more than two dozen cases in the final stage of investigation, and anticipate enforcement action in all or most of these cases within the next few months.

2. For each NAL, please provide (1) the amount of the proposed forfeiture; (2) the program, station, and corporate parent to which the NAL was issued; and (3) the length of time it took the Commission to issue each NAL, beginning from the date on which the complaint was filed.

See Exhibit 2.

3. Is there, by statute or regulation, a time period within which the Commission must issue an NAL?

Section 503(b)(6) of the Act requires that the Commission issue an NAL by the later of: (a) one year after the date of the misconduct that is the subject of the NAL; or (b) the date on which the license for the station in question is first renewed after the license term during which the misconduct occurred.

If yes, during each year in question, how many times has the FCC been forced to dismiss or deny a complaint for failure to respond in a timely manner?

Year	Complaints Dismissed/Denied Due to SOL
2004	1
2003	0
2002	0
2001	0
2000	1
1994-1999	NA

4. Does the Enforcement Bureau routinely notify you and other commissioners prior to acting on a complaint (whether the action is issuing and NAL or dismissing the complaint)? Were you aware of the Enforcement Bureau's decision to not issue an NAL with respect to the NBC broadcast of the 2003 Golden Globe Awards, prior to the Enforcement Bureau releasing that decision?

The Enforcement Bureau consults with my staff, and notifies the staff of the other commissioners, before it takes or proposes any indecency enforcement action on delegated authority, as well as before it denies or dismisses major indecency complaints on delegated authority. Although I was not personally aware of the Enforcement Bureau's action in the Golden Globes case prior to the release of its Order, the Bureau did consult with my staff and notify the staff of the other commissioners before taking that action.

5. Please list all instances in which the FCC issued an NAL against a licensee for broadcasting language that the Commission alleged was either obscene or profane.

There are no such instances in the history of the Commission. Because it is easier to prove an indecency violation than an obscenity violation, the Commission proceeds under the indecency standard. We have recently been considering ways that the Commission may be able to apply more effectively the profanity standard.

III. FCC Process for Issuing Forfeiture Orders

1. For each year in question, please provide the number of forfeiture orders issued pursuant to Sec. 503(b) of the Communications Act for violations of the Commission's indecency policies.

Year	No of Forfeiture Orders */
2004	1
2003	1
2002	3
2001	2
2000	6
1999	0
1998	0
1997	2
1996	0
1995	0
1994	0

*/ As shown in Exhibit 2, in many cases, the licensee pays an indecency forfeiture at the NAL stage (although it is not required by law to do so) and the Commission thus need not issue a forfeiture order.

2. For each forfeiture order, please provide (1) the amount of the final forfeiture; (2) the program, station, and corporate parent to which it was issued; (3) the amount paid by the licensee; and (4) in instances where the licensee refused to pay, whether the Department of Justice brought an action in federal court to collect the penalty.

See Exhibit 2.

3. Is there, by statute or regulation; a time period within which the Commission must issue a Section 503 forfeiture order after issuing an NAL? If yes, during each year in question, how many times has the FCC been forced to dismiss or deny an NAL for failure to render a final decision on a pending NAL in a timely manner?

There is no statute or Commission rule that specifies a time period after the issuance of an NAL by which the Commission must issue a forfeiture order. However, 28 USC § 2462 provides that a suit to collect a forfeiture must be commenced within five years of the date when the claim first accrued. In light of court decisions, the Department of Justice generally construes this phrase to mean the date of the violation of the Act or the Commission's rules. When the Enforcement Bureau began in late 1999, it inherited four NAL cases involving old broadcasts dating back to as early as 1991. Given the statute of limitations issue under 28

U.S.C. § 2462, the Commission cancelled two of these NALs and the Bureau cancelled the other two. We do not anticipate difficulties in this regard with more recent cases.

IV. FCC Process for Renewing Broadcast Licenses

1. Please describe the process by which the Commission reviews and considers outstanding indecency-related complaints, NALs, and final forfeiture orders against a licensee prior to a renewal of such licensee's license.

Traditionally, the Commission considers issues of wrongdoing by broadcast renewal applicants based upon petitions to deny such applications and upon matters that are the subject of complaints or enforcement actions. In the past, the Commission has generally not considered the violation of the indecency rules to constitute a disqualifying issue at renewal. However, particularly in light of the Commission's recently expressed intention to consider license revocation as a possible sanction in more egregious indecency cases, we will give serious consideration to designating for hearing renewal applications of licensees with serious or repeated indecency violations.

It should be noted that Section 504(c) of the Communications Act of 1934, as amended, provides that, in cases in which the Commission has issued a notice of apparent liability or forfeiture order and the licensee has not paid the forfeiture, the Commission may not use the fact of such a determination against the licensee until after a final court decision. However, the Commission may take notice of the underlying facts of such a case in determining appropriate action. So, for example, if a particular renewal applicant has a series of outstanding forfeitures assessed for separate indecency violations, while the Commission cannot consider the fact that the forfeitures were assessed in the context of the licensee's renewal application, it can consider the presence of the underlying pattern of misconduct in deciding whether to designate for hearing the licensee's renewal application.

Exhibit 1 (Responses to Questions I-1, I-2, I-3, I-4, and I-5)
Complaint Data 1994 - 2004

Year	No. of Complaints Received During Year	No. of Programs Reflected in Such Complaints	No. of Such Complaints Denied or Dismissed by Year's End	No. of Such Complaints Pending at Year's End
2004	530,885[1]	23	--	--
2003	240,350[2]	318	368	239,982
2002	13,922[3]	345	13,258	664
2001	346	152	242	104
2000	111	101	37	72
1999	5,853	N/A	5,793	60
1998	32,300	N/A	32,095	205
1997	828	N/A	775	53
1996	950	N/A	831	117
1995	947	N/A	872	75
1994	12,817	N/A	12,697	120

[1] This number includes 530,828 complaints regarding the Super Bowl XXXVIII halftime show.

[2] This number includes 239,837 complaints regarding nine specific programs.

[3] This number includes 13,534 complaints regarding four specific programs.

EXHIBIT 2 (Response to Questions II-2 and III-2)
Information Regarding Indecency NALs and Forfeitures Issued 1994-2004

NAL Date	Licensee/(Parent)[4]/Station	Amount[5]	Status	First Complaint Filed[6]
1-27-2004	Clear Channel Broadcasting Licenses, Inc., Citicasters Licenses, LP, Capstar TX Limited Partnership (Clear Channel), WPLA(FM), Callahan, FL, WCKT(FM), Port Charlotte, FL, WXTB(FM), Clearwater, FL, WRLX(FM), West Palm Beach, FL	$715,000	NAL issued; deadline for payment or response 3-4-04.	7-19-2001
1-27-2004	Young Broadcasting of San Francisco, Inc. (Young Broadcasting), KRON-TV, San Francisco, CA	$27,500	NAL issued; response filed 2-26-04.	10-4-2002
10-02-2003	Infinity Broadcasting Operations, Inc (Viacom), 13 radio stations	$357,500	Response received; action is expected this spring.	8-15-2002
10-02-2003	AM/FM Radio Licenses, LLC (Clear Channel), WWDC-FM, Washington, DC	$55,000	NAL paid.	5-7-2002
4-03-2003	Infinity Broadcasting Operations, Inc. (Viacom), WKRK(FM), Detroit, MI	$27,500	Petition for recon. pending; action expected in March.	2-5-2002
12-13-2002	Edmund Dinis, WJFD(FM), New Bedford, MA	$22,400	NAL cancelled 2/3/04.	4-30-2000
8-02-2002	Rubber City Radio Group, WONE-FM, Akron, OH	$7,000	NAL paid.	11-29-2000
6-28-2002	Emmis Radio License Corporation (Emmis Communications Corp.), WKQX(FM), Chicago, IL	$7,000	FO rel. 2/18/04 (DA 04-386).	3-12-2001
6-07-2002	Infinity Broadcasting Operations, Inc (Viacom)., WNEW(FM), New York, NY	$21,000	Response received; action expected this spring.	6-20-2000
5-01-2002	GA-MEX Broadcasting, Inc., WAZX(AM) Smyrna, GA; WAZX-FM, Inc., WAZX(FM), Cleveland, GA	$7,000	NAL paid.	6-1-2001
3-21-2002	Emmis Radio License Corporation (Emmis Communications Corp.), WKQX(FM), Chicago, IL	$21,000	MO&O affm'g FO rel. 2/18/04 (DA 04-387)	3-10-2001
1-28-2002	Entercom Seattle License, LLC (Entercom Communications Corp.), KNDD(FM), Seattle, WA	$14,000	Application for Review of Forfeiture Order (reduced to $12,000) pending; action expected in March.	5-30-2001
6-01-2001	Citadel Broadcasting Company (Ciradel Broadcasting Corp.), KKMG(FM), Pueblo, CO	$7,000	Cancelled.	7-18-2000

[4] As of date of violation/complaint in column entitled "First Complaint Filed."

[5] These figures represent the proposed forfeiture amount. In some instances, the forfeiture amount was ultimately reduced or rescinded.

[6] In some cases for which the complaint date is unavailable, we have used the earliest of the date the complaint was received, entered in the relevant database, or the date of the subject broadcast. Additionally, where an NAL addresses multiple complaints, we have provided the date of the earliest complaint.

NAL Date	Licensee/(Parent)[4]/Station	Amount[5]	Status	First Complaint Filed[6]
5-17-2001	The KBOO Foundation, KBOO-FM, Portland, OR	$7,000	Cancelled.	2-29-2000
4-06-2001	Emmis Radio License Corporation (Emmis Communications Corp.), WKQX(FM), Chicago, IL	$14,000	Application for Review pending; action expected in March.	5-15-2000
4-03-2001	Citicasters Co. (Clear Channel), KEGL(FM), Fort Worth, TX	$14,000	NAL paid.	8-6-2000
3-30-2001	Telemundo of Puerto Rico License Corp., WKAQ-TV, San Juan, PR	$21,000	NAL paid.	5-13-2000
2-08-2001	WLDI, Inc., WCOM(FM), Bayamon, PR	$21,000	FO paid (after recon denied and reduction to $16,800 in forfeiture order)	12-12-2000
1-18-2001	Capstar TX Limited Partnership (AMFM, Inc.), WZEE(FM), Madison, WI	$7,000	NAL paid	8-25-2000
12-05-2000	CBS Radio License, Inc., WLLD(FM), Holmes Beach, FL	$7,000	Application for Review pending; action expected in March.	9-23-1999
10-06-2000	Capstar TX Limited Partnership (AMFM, Inc.), KTXQ(FM), Fort Worth, TX	$7,000	NAL paid	7-17-2000
9-26-2000	Citicasters Co. (Clear Channel), KSJO(FM), San Jose, CA	$7,000	NAL paid	2-21-2000
9-26-2000	Citicasters Co. (Clear Channel), KSJO(FM), San Jose, CA	$7,000	NAL paid	9-21-1999
9-07-2000	Regent Licensee of Flagstaff, Inc., KZGL(FM), Cottonwood, AZ	$6,000	NAL paid	9-10-1999
7-14-2000	Communicast Consultants, Inc., KRXK(AM), Rexburg, ID	$7,000	FO paid (DOJ settled for $2,500)	2-4-1999
4-28-2000	Three Eagles of Columbus, Inc., KROR(FM), Hastings, NE	$7,000	FO paid (after reduction to $6,000 in forfeiture order)	4-17-1999
7-22-1999	WQAM License Limited Partnership, WQAM(AM), Naples, FL	$35,000	FO paid (DOJ settled for full amount)	7-1-1998
3-17-1999	Back Bay Broadcasting, Inc., WWKX(FM), Woonsocket, RI	$7,000	NAL paid.	3-16-1998
10-26-1998	LBJS Broadcasting Company, L.P. KLBJ(FM), Austin, TX	$3,000	NAL paid.	6-12-1998
10-16-1998	Citicasters Co.(Jacor Broadcasting Corporation), WXTB(FM), Clearwater, FL	$23,000	FO aff'ing fine paid.	5-8-1997
8-24-1998	Infinity Broadcasting Corporation of Los Angeles (CBS), KROQ(FM), Los Angeles, CA	$2,000	FO aff'd fine. 15 FCC Rcd 10,667 (EB 2000). MO&O denied Pet. For Recon. 16 FCC Rcd 6867 (EB rel. 2/21/01). USAO declined to prosecute b/c of SOL, per memo dated 5/2/03.	4-23-1997
8-10-1998	Citicasters Co. (Jacor Broadcasting Corporation), WXTB(FM), Clearwater, FL	$4,000	NAL paid.	6-20-1997
6-29-1998	Clear Channel Radio Licenses, Inc., KKND-FM, Port Sulphur, LA	$6,000	NAL paid	4-25-1997
6-05-1998	Eagle Radio, Inc., KEGL(FM), Ft. Worth, TX	$2,000	NAL paid.	3-14-1994

NAL Date	Licensee/(Parent)[4]/Station	Amount[5]	Status	First Complaint Filed[6]
1-08-1998	Citicasters Co.(Jacor Broadcasting Corporation), WXTB(FM), Clearwater, FL	$7,000	FO paid	5-28-1998
12-17-1997	Tempe Radio, Inc.(Sandusky Newspapers, Inc.), KUPD-FM, Tempe, AZ	$2,000	NAL paid.	8-2-1997
8-27-1997	NPR Phoenix, L.L.C., KPTY(FM), Formerly KBZR(FM), Gilbert,AZ	$7,500	MO&O aff'd forfeiture. 13 FCC Rcd 14,070 (MMB rel. 8/6/98). Paid.	11-14-1996
6-24-1997	Grant Broadcasting System II, Inc. WJPR-TV, Lynchburg, VA, WFXR-TV, Roanoke, VA	$2,000	NAL rescinded via unpublished MMB letter dated 8/1/97.	7-24-1993
6-24-1997	CBS Radio, WXRK(FM), New York, NY	$6,000	MO&O rescinded NAL due to passage of time. *See* Sagittarius Broadcasting Corp, 16 FCC Rcd 2901 (EB rel. 2/5/01).	10-25-1995
6-24-1997	Jacor Broadcasting Corporation, WEBN(FM), Cincinnati, OH	$4,000	FO aff'd forfeiture. 13 FCC Rcd 5825 (MMB 8-27-1997). Forfeiture paid.	2-26-1997
6-24-1997	American Radio Systems License Corp., WCMF(AM) & (FM), Rochester, NY	$2,000	NAL paid.	8-17-1994
4-08-1997	EZ New Orleans, Inc., WEZB, New Orleans, LA	$12,000	NAL paid.	11-22-1995
11-12-1996	Waterman Broadcasting Corp. of Texas, KTFM(FM), San Antonio, TX	$7,500	NAL rescinded via unpublished letter on 4-15-1997 (see 13 FCC Rcd 14,070 at note 2).	1-26-1996
10-15-1996	WVGO License Limited Partnership, WBZU(FM), Richmond, VA	$10,000	FO reduced fine to $6,000. 12 FCC Rcd 5918 (MMB rel 5-1-1997). Paid.	10-23-1995
10-04-1996	Jencom Broadcasting, Inc.,WVIC(FM), East Lansing, MI	$8,000	NAL cancelled 5-9-97.	6-3-1996
5-12-1995	Rich Communications Corporation, WGRF(FM), Buffalo, NY	$4,000	NAL paid.	9-1-1993
9-14-1994	WCKS Broadcasting, Ltd., WWST(FM), Karns, TN	$4,000	NAL paid.	4-10-1991
8-29-1994	Southern Nevada Radio, Inc., KKLZ (FM), Las Vegas, NV	$8,000	MO&O aff'd forfeiture. 13 FCC Rcd 2787 (MMB rel. 2-9-1998). Forfeiture cancelled 6-22-99.	3-16-1994
5-20-1994	Infinity Broadcasting & Sagittarius Broadcasting Corporation, WJFK(AM), Baltimore, MD; WXRK(FM) New York, NY; WYSP(FM) Philadelphia, PA; WJFK(FM) Manassas, VA	$200,000	Paid as part of a settlement. *See* 10 FCC Rcd 12,245 (9-5-1995).	1-6-1993
4-01-1994	Agape Broadcasting Foundation, Inc., KNON(FM), Dallas, TX	$12,500	MO&O reduced forfeiture to $2,000. 13 FCC Rcd 9262 (MMB rel. 2-10-1998). Forfeiture paid.	7-12-1992
4-01-1994	Flambo Broadcasting, Inc., KFMH-FM, Muscatine, IA	$12,500	NAL cancelled, 15 FCC Rcd 23,429 (EB 7-27-2000).	8-30-1991
2-01-1994	Infinity Broadcasting & Sagittarius Broadcasting Corporation, WJFK(AM), Baltimore, MD; WXRK(FM) New York, NY; WYSP(FM) Philadelphia, PA; WJFK(FM) Manassas, VA	$400,000	Paid as part of a settlement. *See* 10 FCC Rcd 12,245 (9-5-1995).	10-12-1994